Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

REGINA G. BREWER,

Petitioner,

v.

JANET SCHALANSKY, Secretary of the Kansas Department of Social and Rehabilitation Services,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Preface

Respondent denied Petitioner Regina Brewer's application for Medicaid on the basis that stock Petitioner owned in joint tenancy with right of survivorship constituted an available resource. Petitioner's joint tenants refused to consent to a sale of the stock. Petitioner contends that the stock would not be considered a resource for determining her eligibility for supplemental security income (SSI), and thus, pursuant to 42 U.S.C. §§ 1396a(a)(17)(B) & 1396a(a)(10)(C)(i), should not have been counted against her for Medicaid purposes.

1. Whether Respondent's denial of Petitioner's application for Medicaid violates 42 U.S.C. § 1396a(a)(17)(B)–which prohibits states from considering resources that would be disregarded in determining eligibility for SSI–and/or 42 U.S.C. § 1396a(a)(10)(c)(i)–which prohibits states from using Medicaid eligibility criteria that is more restrictive than SSI eligibility criteria.

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OPINION BELOW

The Kansas Supreme Court's opinion is published as *Brewer* v. *Schalansky*, 278 Kan. 734, 102 P.3d 1145 (2004) (*see* Appendix at 1-28). The District Court of Johnson County, Kansas did not publish an opinion. Its Journal Entry is reproduced in the Appendix at 30-31. The initial and final orders of the Kansas Department of Social and Rehabilitation Services are unpublished, and are reproduced in the Appendix at 32-40.

JURISDICTION

In this Petition, Petitioner challenges the actions of Respondent and the Kansas Supreme Court in applying Kansas law in a manner that is repugnant to the laws of the United States. Accordingly, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257. This Court also has jurisdiction under 28 U.S.C. § 1257 because this matter involves denial of Medicaid benefits guaranteed by the statutes of the United States. The Kansas Supreme Court's opinion was entered on December 17, 2004. Petitioner filed a timely Motion for Re-hearing or Modification on January 6, 2005. The Kansas Supreme Court denied Petitioner's motion on January 26, 2005.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1396a(a)(17)(B)

A State Plan for Medical Assistance must–....(17) except as provided in subsections (l)(3), (m)(3), and (m)(4), include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with

respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV, and with respect to whom supplemental security income benefits are not being paid under title XVI, based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this title, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV, or to have paid with respect to him supplemental security income benefits under title XVI) as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits....

42 U.S.C. § 1396a(a)(10)(C)(i)

A State Plan for Medical Assistance must–....(10) provide ....(C) that if medical assistance is included for any group of individuals described in section 1905(a) who are not described in subparagraph (A) or (E), then--

> (i) the plan must include a description of (I) the criteria for determining eligibility of individuals in the group for such medical assistance, (II) the amount, duration, and scope of medical assistance made available to individuals in the group, and (III) the single standard to be employed in determining income and resource eligibility for all such groups, and the methodology to be employed in determining

such eligibility, which shall be no more restrictive than the methodology which would be employed under the supplemental security income program in the case of groups consisting of aged, blind, or disabled individuals in a State in which such program is in effect, and which shall be no more restrictive than the methodology which would be employed under the appropriate State plan (described in subparagraph (A)(i)) to which such group is most closely categorically related in the case of other groups....

20 C.F.R. § 416.1201(a)(1)

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resources of the individual (or spouse).

K.A.R. § 30-6-106(c)(1)

(c)(1) Resources shall be considered available both when the resources are actually available and when the applicant or recipient has the legal ability to make the resources available. A resource shall be considered unavailable when there is a legal impediment that precludes the disposal of the resource. The applicant or recipient shall pursue reasonable steps to overcome the legal impediment unless it is determined that the cost of pursuing legal action would exceed the resource value of the

property or that it is unlikely the applicant or recipient would succeed in the legal action.

STATEMENT OF FACTS

Petitioner Regina Brewer was born on July 22, 1908, and is presently 96 years old. Petitioner resides in a nursing home operated by ManorCare of Kansas, Inc. ("ManorCare"). Petitioner has lived at the ManorCare facility since November 9, 2001. Petitioner owes ManorCare a debt in excess of $137,000 for care and treatment it provided to Petitioner.

Petitioner has been unable to pay her ManorCare bill because she does not have any means to support herself. Petitioner's only sources of regular income are her monthly social security check and a small pension check, both of which are paid to ManorCare each month. Plaintiff's only significant asset is her joint tenancy interest in certain stock that, as of March 23, 2005, had an approximate value of $24,994.

ManorCare has taken a judgment against Petitioner and has commenced an action to evict her from the nursing home. During the pendency of the underlying case, ManorCare's action to evict Petitioner was stayed, but ManorCare has recently indicated its intent to move forward with the eviction if it is not paid immediately. Petitioner has no place to live or means of support if she is evicted from ManorCare.

Petitioner's unusually high balance at the ManorCare facility is a result of Respondent's denial of Petitioner's application for Medicaid. Without Medicaid benefits, Petitioner cannot pay for her nursing home care. Petitioner filed her application for Medicaid in December 2001. Respondent denied Petitioner's application because it found that her joint

tenancy interest in certain stock (then valued at approximately $33,000) was an available resource. Respondent thus determined that Petitioner's assets exceeded the resource limit for the Kansas Medicaid program. Petitioner's joint tenancy interest in stock, presently valued at less than $25,000, has thus prevented her from obtaining Medicaid benefits, despite the fact that she owes her nursing home over $137,000.

Petitioner appealed the denial of her Medicaid application, arguing that the stock was not an available resource because it was owned in joint tenancy with right of survivorship, and because the joint owners refused to sell the stock. In 1994–seven years before she applied for Medicaid–Petitioner transferred the stock to herself and her two nieces as joint tenants with right of survivorship. The stock remained in joint tenancy at the time of Petitioner's application.

On appeal, Respondent held that the stock was available to Petitioner despite the joint-owners' refusal to allow the stock to be sold. For support of this position, Respondent relied on K.A.R. § 30-6-106(c)(1). Respondent acknowledged that the nature of the ownership of the stock created a legal impediment to Petitioner's ability to convert the stock to cash. However, Respondent held that Petitioner would need to file a lawsuit to attempt to partition the stock, and overcome that legal impediment.

Petitioner then filed an appeal with the state appeals committee, arguing that the stock was not available, and that no federal law allowed Respondent to count the stock as a resource. The state appeals committee affirmed Respondent's denial of Petitioner's Medicaid application, still maintaining that K.A.R. § 30-6-106(c)(1) required Petitioner to file a lawsuit to attempt to partition the stock.

Petitioner timely filed a Petition for Judicial Review in the District Court of Johnson County,

Kansas. Petitioner argued that K.A.R. § 30-6-106(c)(1) does not require her to file a lawsuit due to the cost of pursuing such a lawsuit, and Petitioner's chances of succeeding in such an action. Petitioner also argued that requiring Petitioner to file a lawsuit to attempt to make the stock available to her is contrary to federal law. Specifically, Petitioner argued that the stock would not be counted against her for purposes of determining her eligibility for supplemental security income (SSI), and that 42 U.S.C. § 1396a(a)(17)(B) prohibits states from considering resources for Medicaid eligibility purposes when such resources would not be considered in determining eligibility for SSI.

The district court agreed that K.A.R. § 30-6-106(c)(1) does not require Petitioner to resort to litigation to attempt to make the stock available to her. Because the district court found for Petitioner on this basis, it chose not to consider whether K.A.R. § 60-30-106(c)(1), as applied by Respondent, violates 42 § U.S.C. 1396a. Respondent appealed the district court's decision, and that appeal was transferred to the Kansas Supreme Court.

On appeal, the Kansas Supreme Court reversed the district court with respect to the state law issue. With regard to the federal question, the court recognized that 42 U.S.C. § 1396a(a)(17)(B) prohibits states from considering resources that would not be deemed available to Petitioner in determining her eligibility for SSI. The court further recognized that, as interpreted by the Social Security Administration ("SSA"), federal law would not permit consideration of Petitioner's stock in determining her eligibility for SSI. Despite reaching these conclusions, however, the court held that Respondent's interpretation of federal Medicaid law was reasonable, and that Petitioner was obligated to file a lawsuit to attempt to partition the stock. In so holding the Kansas Supreme Court stated that K.A.R. § 30-6-106(c)(1), as applied by Respondent–which is a 180 degree departure from

SSA's interpretations of 20 C.F.R. § 416.1201–is a reasonable interpretation of, and does not offend, federal law. Justice Davis filed a dissenting opinion.

Statement Pursuant to Rule 14(g)(i).

Pursuant to Supreme Court Rule 14.1(g)(i), Petitioner provides the following statement setting forth the arguments raised to the district court and the Kansas Supreme Court. Petitioner argued to the district court that denial of Petitioner's Medicaid application was contrary to 42 U.S.C. § 1396a(a)(17)(B), because the denial was based on consideration of resources that would have been disregarded in considering Petitioner's eligibility for SSI. (Memorandum in Support of Petitioner's Motion for Summary Judgment R.Vol. I at 46-49; Transcript of Proceedings R.Vol. III at 11:24-14:1.) Petitioner made this same argument to the Kansas Supreme Court. (Brief of Appellee at 12-15; Decision of the Supreme Court of the State of Kansas at Appendix Pages 17-18.)

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THIS PETITION BECAUSE THE DENIAL OF PETITIONER'S MEDICAID APPLICATION VIOLATES FEDERAL MEDICAID LAW.

A. Basic Principles of Medicaid Law.

The Medicaid program was enacted in 1965 by Title XIX of the Social Security Act, now 42 U.S.C. § 1396 *et seq*. *Harris* v. *McCray*, 448 U.S. 297, 301 (1980). The program's purpose is to provide federal financial assistance to states that choose to reimburse certain costs of medical treatment for needy persons. *Id*. States are not required to participate in the Medicaid program. *Id*. However, if a state chooses to participate in the Medicaid program, it is bound by

the requirements of Title XIX. *Id.* Kansas has elected to participate in the Medicaid program, and thus must comply with federal Medicaid law. *Martin* v. *Kansas Department of Social and Rehabilitation Services*, 26 Kan. App. 2d 511, 512, 988 P.2d 1217, 1219 (1999).

States that participate in the Medicaid program must provide financial assistance to the "categorically needy." *Harris*, 448 U.S. at 301. Included within this category are applicants who are aged, blind or disabled, and who are eligible for supplemental security income (SSI). 42 § U.S.C. 1396a(a)(10)(A); *Harris*, 448 U.S. at 301, n.1. Thus, if a state participates in the Medicaid program all persons who are eligible to receive SSI benefits for the aged, blind or disabled are also eligible for Medicaid benefits.

In addition to providing benefits to the categorically needy as set forth above, states may elect to extend their Medicaid programs to include benefits for other applicants who are deemed "medically needy." 42 U.S.C. § 1396a(a)(10)(C). Medically needy individuals include, among others, aged, blind and disabled persons who are otherwise eligible for SSI, but who do not meet the financial criteria for SSI eligibility. 42 U.S.C. § 1396a(a)(10)(C); *Lewis* v. *Thompson*, 252 F.3d 567, 570 (2001). When a state chooses to provide benefits to the medically needy, it must use eligibility criteria that (with the exception of income and resource levels) is no more restrictive than the criteria used for the related SSI program. 42 U.S.C. § 1396a(a)(10)(C)(i); *see also* 42 C.F.R. § 435.601(b) (requiring states to use the financial methodology of the most closely related cash assistance program in determining a medically needy applicant's eligibility for Medicaid). In other words, if an aged person who is not financially eligible for SSI applies for Medicaid, the criteria that the state uses to determine her eligibility must be no more restrictive (with the exception of income and resource levels) than the criteria for determining her eligibility for age-related SSI benefits.

Furthermore, if a state has elected to provide benefits to the medically needy, in considering a medically needy applicant's eligibility, it must consider only resources that would not be disregarded for determining the applicant's eligibility for the related SSI program. 42 U.S.C. § 1396a(a)(17)(B). Thus, if a medically needy, aged person applies for Medicaid and has an asset that is not considered a resource for SSI purposes, that asset cannot be considered by the state in determining the applicant's Medicaid eligibility.

Like many other states, Kansas has elected to provide Medicaid benefits to the medically needy. K.A.R. § 30-6-85; *see also* Kansas State Plan under Title XIX of the Social Security Act Medical Assistance Program § 2.2; POMS SI 01715.020. Accordingly, Kansas is required to follow the provisions of 42 U.S.C. § 1396a(a)(10)(C)(i) and 42 U.S.C. § 1396a(a)(17)(B) as set forth above. Kansas is thus prohibited from denying Medicaid to a medically needy person if such denial is based on criteria that is more restrictive than the criteria for the appropriate SSI program. Similarly, Kansas is prohibited from considering resources that would be disregarded in determining the applicant's eligibility for the related SSI program.

B. The Denial of Petitioner's Medicaid Application Violates 42 U.S.C. § 1396a(a)(17)(B) and 42 U.S.C. § 1396a(a)(10)(C)(i) Because Petitioner's Stock Would be Disregarded for SSI Purposes and Thus Should Have Been Disregarded by Respondent.

1. Federal Law Prohibits Respondent From Considering Resources That Would Not Be Considered in Determining Petitioner's Eligibility for SSI.

Despite clear statutory mandates to the contrary, Respondent has denied Medicaid to Petitioner (a medically needy person), by using criteria that is more restrictive than the related SSI program criteria, and

by considering resources that would be disregarded for determining Petitioner's eligibility for SSI.

Petitioner is age-related medically needy. K.A.R. § 30-6-85. She meets all of the eligibility criteria for the SSI program, except for the financial criteria. Because Petitioner is medically needy, in considering Petitioner's application for Medicaid Respondent cannot use a criteria that is more restrictive than the criteria for the SSI program. 42 U.S.C. 1396a(a)(10)(C)(i); 42 C.F.R. § 435.601(b). Respondent is also prohibited from considering resources that would be disregarded in determining Petitioner's eligibility for SSI benefits. 42 U.S.C. § 1396a(a)(17)(B). Respondent disregarded these federal statutes, and wrongfully denied Petitioner's Medicaid application.

2. Petitioner's Joint Tenancy Interest in Stock Would Not Be Considered Against Her for SSI Eligibility Purposes, And Should Not Have Been Counted Against Her For Medicaid Purposes

Petitioner's Medicaid application was denied because she was found to have available resources that exceed the $2,000 maximum resource limit (K.A.R. § 30-6-107) for Medicaid eligibility under Kansas law. Petitioner is not challenging Respondent's authority to set this resource limit. Instead, Petitioner has argued that the reason why she was deemed to have resources that exceed the allowable limit was because Respondent used a criteria for determining what resources were available to Petitioner that is more restrictive than the SSI criteria, and considered resources that would have been disregarded for SSI purposes.

The resource in question here is a group of certificated stocks owned by Petitioner and her two nieces (Joan Sieker Wilson and Regina Hellebuyck) as joint tenants with right of survivorship. The stock had been owned in this manner for seven years before

Petitioner applied for Medicaid. Because the stock is owned in joint tenancy, Petitioner cannot sell the stock without the permission and endorsement of the joint tenants. Petitioner's joint tenants have expressly refused to consent to a sale of the stock. Respondent, and the Kansas Supreme Court consider the stock available to Petitioner because she could file a lawsuit to attempt to force a sale. Petitioner argues that the lack of co-owner consent makes the stock unavailable for SSI purposes, and thus for Medicaid purposes as well. The central issue in this matter is thus whether stock owned in joint tenancy with right of survivorship, under circumstances where one or more joint tenants refuse to consent to a sale of the stock, would be counted against an applicant for SSI. Because the answer to that question is no, Petitioner's stock should not have been counted against her, and Respondent's decision, as affirmed by the Kansas Supreme Court, violates controlling federal authority.

Given the nearly infinite number of types of resources that exist, and the various manners in which resources can be owned, the federal statutes and regulations cannot specifically address each potential resource ownership possibility. Instead, the regulatory provision pertaining to resources is much more general. 20 C.F.R. § 416.1201. The regulation states, in relevant part, "resources means cash or other liquid assets or any real or personal property that an individual.... owns and could convert to cash to be used for his or her support and maintenance." The regulation further clarifies that, if an "individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource." *Id.*

For further clarification of whether an asset is considered a resource under a given set of circumstances, one must look to the official Social Security Administration ("SSA") interpretation of the regulations. Such interpretations are embodied in the

SSA's Program Operations Manual System ("POMS"). The POMS contain the criteria that are used for determining eligibility for SSI. The POMS specifically address the situation at issue here, and make clear that the stock would not be counted as a resource against Petitioner for SSI purposes, and thus should not have been counted against her for Medicaid purposes.

POMS SI 01120.010(c)(2) states:

> When there is a legal bar to the sale of property **(*e.g.*, if a co-owner legally blocks the sale of jointly owned property)**, we do not require an individual to undertake litigation in order to accomplish sale or access. **The property is not a resource under such circumstances** (emphasis added).

The SSA also publishes the Social Security Handbook. This handbook is the document through which, among other things, the SSA explains what resources will and will not be counted against an applicant for SSI. In that regard, § 215.2 of the handbook states:

> Only that portion of property that is designated as belonging to you can be considered your resource (except for deeming as described in § 2167). If there is more than one owner and the consent of the co-owner(s) is needed for you to liquidate your share, then your share is not a resource if the co-owner(s) do not agree to sell.

In this case, the stock is owned in the names of three individuals. It is not possible for Petitioner to sell the stock without the agreement and endorsement of her joint tenants. Because the joint tenants refuse to allow the stock to be sold, the stock would not be counted as a resource against Petitioner for SSI purposes. POMS SI 01120.010(c)(2). Therefore, pursuant to 42 U.S.C. §§ 1396a(a)(17)(B) & 1396a(a) (10)(C)(i); the stock should not have been considered against

Petitioner for Medicaid purposes. Respondent's denial of Petitioner's application was in contravention of controlling federal law, and the Kansas Supreme Court's decision upholding that denial should be reversed.

3. The Fact That The POMS Provisions Are Not Regulations Does Not Change The Fact That Resources That Are Disregarded For SSI Purposes Must Also Be Disregarded For Medicaid Purposes.

The Kansas Supreme Court recognized that the POMS provides that the stock would not be counted as a resource for SSI purposes, but dismissed the POMS provisions, because they are not federal regulations. Appendix at 19-20. The Kansas Supreme Court held that § 1396a(a)(17)(B) only requires states to follow federal "standards," that POMS are not "standards," and that states are thus free to enact laws that are in direct conflict with POMS.

In so holding, the Kansas Supreme Court misinterpreted the first portion of §1396a(a)(17)(B), and ignored the second portion. The Kansas Supreme Court's holding turns on the term "standards" as set forth in the statute. Section 1396a(a)(17)(B) provides, in part, that state plans can take into account only resources that are "in accordance with standards prescribed by the Secretary" (emphasis added) available to the applicant. The Kansas Supreme Court equated the term "standards" with the term "regulation." Interpreting the statute in this manner, the Kansas Supreme Court held that the provisions of the POMS are not regulations, and thus are not "standards." Accordingly, the court held that they are not binding on Kansas.

The problem with this rationale is that Congress clearly understands the legal significance of the term "regulation," and would have used that word if it intended to require only that states follow promulgated regulations. By choosing to use a more

broad term like "standards," Congress obviously intended that states would be bound by all standards set by the Secretary, whether by regulation or the POMS. The Kansas Supreme Court's narrow reading of the term "standards" assumes a level of carelessness that should not be imputed to the members of Congress.

Additionally, the Kansas Supreme Court's holding ignores the further provision in § 1396a(a)(17)(B) that prohibits states from considering resources that would be disregarded in determining eligibility for the related SSI program. This second provision is not limited to "standards" prescribed by the Secretary. It simply requires that any resource that would be disregarded for SSI purposes also be disregarded for determining eligibility for Medicaid. The POMS provisions make clear that the stock would be disregarded in determining Petitioner's eligibility for age-related SSI. Accordingly, the stock should also have been disregarded by Respondent in determining Petitioner's eligibility for Medicaid. The fact that it was not disregarded violates 42 U.S.C. §§ 1396a(a)(10)(C)(i) & 1396a(a)(17)(B), and the Kansas Supreme Court should be reversed.

II. THE COURT SHOULD GRANT THIS PETITION BECAUSE STATES ARE INCONSISTENTLY APPLYING THE RESOURCE RULE FOR JOINTLY OWNED ASSETS AND HAVE THUS CREATED A SITUATION WHERE SIMILARLY-SITUATED APPLICANTS ARE RECEIVING DISPARATE TREATMENT BASED SOLELY ON THEIR STATE OF RESIDENCE.

Although no federal circuit court has addressed the issue, many states have adopted rules relating to the availability of jointly-owned assets when a joint owner refuses to consent to sell the asset. The majority of the states that have considered the question have adopted rules consistent with the federal law discussed above, and do not require a Medicaid

applicant to resort to litigation to attempt to sell jointly owned assets. However, a few states, like Kansas, have adopted a contrary position. In doing so such states have created an irreconcilable and unjustifiable conflict that results in disparate treatment of similarly situated Medicaid applicants. The Court now has the opportunity to resolve this conflict, and to correct the grave injustice caused by Respondent's denial of Petitioner's Medicaid application.

According to the Social Security Administration, in addition to Kansas, 33 states and the District of Columbia have elected to provide Medicaid benefits to persons who are medically needy based on age, blindness or disability. POMS SI 01715.020. By agreeing to do so, those states have become bound by 42 U.S.C. §§ 1396a(a)(10)(C)(i) & 1396a(a)(17)(B). Accordingly, if a medically needy person applies for Medicaid in those states, and has a joint asset that cannot be sold because a joint owner will not consent to a sale, the states must determine the availability of the asset in accordance with federal law.

At least ten of the 34 states providing services for the medically needy have adopted rules and procedures that explicitly state that Medicaid applicants are not required to resort to litigation to attempt to force a sale of jointly-owned assets.[1] In addition,

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[1] Arkansas Financial Assistance Manual § 2320.3(2)(a) ("When it is established (in writing) that consent to sell joint tenancy property cannot be obtained from the other owner(s), the property will not be considered a countable resource."); Florida Medicaid Manual § 1615.05.10 ("If consent to sell is required and such permission is withheld, the property cannot be included as the individual's asset."); Iowa Department of Human Services Medicaid Resources, Title XIII, Chapter D ("A client is not required to start a lawsuit to access or sell a resource."); Kentucky Medicaid and State Supplementation Manual MS 1940(b)(7) ("Consider no resources available when any of the parties of the jointly held resource are not willing to release their portion of the

another four states have rules and procedures that suggest that litigation would not be necessary, but do not specifically address the issue.[2] On the other hand, Petitioner was able find only four states (including Kansas) that clearly require a Medicaid applicant in Petitioner's situation to resort to litigation.[3]

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resource."); Louisiana Medicaid Eligibility Manual I-1634.3 (allowing an applicant to rebut the presumption of equal ownership of joint assets if access to the asset is denied by other owners); MaineCare Eligibility Manual 10-144 Chapter 332 § 2233 ("If the terms of ownership prohibit sale of one owner's portion or the other owner(s) refuses to agree to sell, the real estate is excluded."); Minnesota MDHS Healthcare Programs Manual ML 41 § 0909.09 (stating that jointly owned assets are unavailable when "the joint owner refuses to allow the sale or disposal of the asset"); North Carolina Adult Medicaid Manual MA-2230 (iv.B.2.c.1 & iv.B.3.a.2) (noting that an asset is available if the applicant "can dispose of the asset without the consent or participation of the other owner, and that resources are not counted if the other owner "refuses to dispose"); Pennsylvania Medicaid Eligibility Handbook § 340.2 ("Assume that the resource is not available when consent of the other owner to dispose of a resource is needed but consent is refused."); Virginia Medicaid Eligibility Manual M1110.115(a) (noting that stock that cannot be sold without the consent of a joint owner will not be counted as a resource without such consent being given.).

[2] Idaho Medicaid Handbook § 4.03.01.330.03 (noting that an applicant does not have to make efforts to sell property "when circumstances beyond his control prevent taking the required actions"); Massachusetts 130 C.M.R. 520.006(b) (giving examples of assets that are considered "inaccessible," but not specifically addressing assets that cannot be sold without the consent of joint owners); Montana Public Assistance Bureau Manual MA402-1 (noting that bonds are not available resources if a joint owner refuses to allow a sale of the bond); New Jersey Medicaid Only Manual N.J.A.C. 10:71-4.4(b)(6) (indicating that value of resources that are not accessible to an individual "through no fault of his or her own" are not resources, specifically including real property that cannot be sold due to the refusal of a co-owner).

[3] Nebraska Health and Human Services Manual 468 NAC2-008.02A (requiring legal action where feasible to liquidate

Petitioner's research did not yield specific information for the remaining 16 medically needy states, which have apparently not directly addressed the issue.

Despite the fact that 42 U.S.C. §§ 1396a(a)(10)(C)(i) & 1396a(a)(17)(B) apply equally to all states that provide Medicaid benefits to the medically needy, the states have not been applying this federal authority evenhandedly. Instead, those applicants fortunate enough to reside in a state that gives proper deference to federal law, and federal interpretations thereof, are being treated more favorably than less fortunate applicants who reside in states that apply their own laws, in direct contravention of the express purpose and interpretation of federal authority. Under the law as it is currently being applied, similarly situated Medicaid applicants are receiving disparate treatment, based solely on their state of residence. This result should not be tolerated. Having agreed to provide Medicaid benefits to the categorically needy, Kansas must fall in line with the other medically needy states and follow the mandates of 42 U.S.C. §§ 1396a(a)(10)(C)(i) & 1396a(a)(17)(B). Because it has not done so, Petitioner has been wrongfully denied Medicaid benefits, and the Kansas Supreme Court should be reversed.

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resources); Utah InfoSource Medicaid Manual § 511-4 & 5 (requiring litigation to attempt to sell joint assets under certain circumstances); Washington Eligibility A-Z Manual WAC388-470-0005 Clarifying Information (requiring legal action in certain circumstances to overcome "legal barriers," including a joint owner's refusal to sell).

CONCLUSION

For the forgoing reasons, the Court should grant Petitioner's Petition for a Writ of Certiorari and reverse the decision of the Kansas Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 91,044

REGINA G. BREWER,

Appellee,

v.

JANET SCHALANSKY, *et al.,*

Appellant,

and

REGINA HELLEBUYCK, *et al.,*

Appellees.

SYLLABUS BY THE COURT

1. For purposes of Medicaid eligibility, property which is partially transferred may be a resource available to the applicant. If the applicant has an ownership interest and the authority or power to liquidate the property or the applicant's share of the property, the property is a resource of the applicant regardless of when the partial transfer occurred.

2. There is a rebuttable presumption of equal ownership between tenants of joint tenancy property. The burden of proving that joint tenancy property is owned other than equally between the joint tenants lies with the party making that claim.

3. Under the facts of this case, even though property was held in joint tenancy there was substantial evidence to support the Kansas Department of Social and Rehabilitation Services' conclusion that the full

value of a stock account was a resource of the applicant because the applicant had contributed the full amount in the account and evidence was conflicting regarding whether the applicant intended to donate an interest to the other tenants. The determination of how much of the stock' s value was attributable to a Medicaid applicant was a factual one, and a court reviewing the administrative determination could not substitute its judgment for that of the agency.

4. Implied waiver of the right to partition is based on interpretation of a contract or agreement between cotenants. Because the right to partition enjoys a favored status in the law and is based on the equitable doctrine that it is better to have the control of property in one person than in several who may entertain divergent views with respect to its proper control and management, any agreement which purports to waive the right to partition should be strictly construed.

5. A Medicaid applicant has the burden to supply, insofar as the applicant or recipient is able, information essential to the establishment of eligibility.

6. Any person challenging an agency action has the burden of establishing that the action is invalid.

7. An administrative hearing officer's findings of fact must be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.

8. Under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, the court conducting judicial review of the agency action is limited to the agency record for its review of disputed facts, unless a statutory exception applies.

9. K.A.R. 30-6-106(c)(1) is a reasonable standard for determining Medicaid eligibility and does not conflict with any federal statute or regulation.

Appeal from Johnson district court; GERALD T. ELLIOTT, judge. Reversed. Opinion filed December 17, 2004.

Reid Stacey, of Kansas Department of Social and Rehabilitation Services, Legal Division, argued the cause and was on the briefs for appellant.

Christopher J. Sherman, of Payne & Jones, Chartered, of Overland Park, argued the cause, and *Keith Martin,* of the same firm, was with him on the brief for appellee Regina G. Brewer.

Tedi McDonald and *Tim S. Davidson,* of McCormick, Adam & Long, P.A., of Overland Park, were on the brief for *amicus curiae* ManorCare of Kansas, Inc.

The opinion of the court was delivered by

LUCKERT, J.: This is a Medicaid eligibility case in which the Kansas Department of Social and Rehabilitation Services (SRS) denied the application for benefits filed by Joan Seiker Wilson for her aunt, Regina Brewer (petitioner/appellee). SRS found that Brewer had nonexempt available resources in excess of regulatory limits because she held stocks worth approximately $33,000 in joint tenancy with two nieces, Joan Seiker Wilson and Regina Hellebuyck (defendants/appellees).

Brewer inherited the stocks upon her husband's death in 1991. He had received the stock as a benefit of his employment with Southwestern Bell Telephone Company. In 1994, Brewer added her two nieces, whom she had raised, as joint tenants with rights of survivorship of the stock. In 2001, Brewer sought Merrill Lynch's assistance in tracking shares she

received from stock splits and as a result of various spin-offs and mergers of telecommunications companies following the break-up of AT&T. Brewer and her nieces opened an account with Merrill Lynch as joint tenants with rights of survivorship.

At the time of the Medicaid application, the stock could not be sold or otherwise disposed of without the consent of each joint tenant. Both of Brewer' s nieces refused to consent to a sale of the stock.

After SRS denied Brewer' s application for Medicaid benefits, Brewer requested a fair hearing pursuant to K.S.A. 2003 Supp. 75-3306 and argued that the nature of the parties' ownership of the stock precluded Brewer from selling it or converting it to cash; therefore, the stock was unavailable to Brewer as a resource. The hearing officer entered an initial order upholding the denial of benefits and ruling that the stock was an available resource. The hearing officer found that Wilson, who holds Brewer' s power of attorney, had not taken reasonable steps to make the stock available, including legal action to force the sale. Brewer timely petitioned for review by the State Appeals Committee, which affirmed the hearing officer' s decision.

Brewer then petitioned for judicial review of the agency' s action. The district court reversed SRS' s decision, ruling that Brewer was not obligated to file a lawsuit seeking partition because the cost of such a lawsuit would likely exceed any benefit Brewer would receive as a result and because such a lawsuit was unlikely to succeed. The district court chose not to address Brewer' s additional argument that federal law precludes SRS from considering the stock as an available resource.

SRS timely appealed, and the appeal was transferred to this court on its own motion pursuant to K.S.A. 20-3018(c).

Amicus Curiae

ManorCare of Kansas, Inc., the nursing home where Brewer currently resides, has filed an *amicus curiae* brief. That brief contains several appendices which include information about the cost of care, the amount of Brewer' s outstanding balance with ManorCare, and a subsequent application for Medicaid filed by Brewer in November 2003. Because these appendices do not comply with the requirement of Supreme Court Rule 6.02(f) (2003 Kan. Ct. R. Annot. 35) that an appendix consist of " limited extracts from the record on appeal," the court will disregard them. See *Thompson v. KFB Ins. Co.,* 252 Kan. 1010, 1015-16, 850 P.2d 773 (1993).

On legal issues, the *amicus* brief generally parallels the arguments Brewer makes in her brief.

Standard of Review

Because this case involves judicial review of an agency action under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.,* this court' s standard of review is statutorily defined by K.S.A. 77-621. See *Fischer v. Kansas Dept. of SRS,* 271 Kan. 167, 175, 21 P.3d 509 (2001). As applicable to this case, the court may grant relief if the agency has erroneously interpreted or applied the law; if the agency action is based on a determination of fact that is not supported by substantial evidence when viewed in light of the record as a whole; or if the agency' s action is unreasonable, arbitrary, or capricious. K.S.A. 77-621(c).

This court makes the same review of an agency' s action as does the district court. *Miller v. Kansas Dept. of SRS,* 275 Kan. 349, 353, 64 P.3d 395 (2003). A rebuttable presumption of validity attaches to an administrative agency' s actions, and the party

challenging the agency' s action bears the burden of proving arbitrary and capricious conduct. *Connelly v. Kansas Highway Patrol,* 271 Kan. 944, 9 65, 26 P.3d 1246 (2001), *cert. denied* 534 U.S. 1081 (2002). The appellate court " must accept as true the evidence and all inferences to be drawn therefrom which support or tend to support the findings of the factfinder. We are to disregard any conflicting evidence or other inferences. [Citation omitted.]" *Connelly,* 271 Kan. at *965.*

Did SRS Correctly Determine that Petitioner was Ineligible for Medicaid Because of Excess Resources?

The declared purpose of the Medicaid program under Title XIX of the Social Security Act is to furnish " medical assistance on behalf of.. . disabled individuals, whose income and resources are insufficient to meet the cost of necessary medical services. . . ." 42 U.S.C. § 1396 (2000). The program is a cooperative administered by the federal government and participating states. Kansas, as well as any state which chooses to participate in the program, must comply with federal statutory requirements. *Ussery v. Kansas Dept. of SRS, 258* Kan. 187, Syl. ¶ 1, 899 P.2d 461 (1995). See *Harris v. McRae,* 448 U.S. 297, 301, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980).

42 U.S.C.A. 1396a(a)(17)(B) (Supp. 2004) provides that a state plan for medical assistance must " include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which. . . provide for taking into account only such income and r esources a s a re, a s d etermined i n accordance with standards prescribed by the Secretary, available to the applicant or recipient." The statute further limits consideration to such income and resources as would not be disregarded in determining an applicant' s eligibility for other

programs, including Supplemental Security Income or SSI.

The Kansas Legislature made the plan available to those who have " insufficient income or resources to provide a reasonable subsistence compatible with decency and health" and delegated the specifics of defining eligibility criteria to the Secretary of SRS. K.S.A. 39-709(a)(1). Pursuant to this authority, the Secretary has promulgated regulations specifying eligibility criteria. Among the eligibility requirements is a limitation upon the value of resources which an applicant may own; if the applicant has nonexempt available resources in excess of $2,000, he or she is not eligible for public medical assistance. K.A.R. 30-6-107.

Federal regulations define the term " resources," in pertinent part, as

" cash or other liquid assets or any real or personal property that an individual. . . owns and could convert to cash to be used for his support and maintenance. If the individual has the right, authority or power to liquidate the property, or his share of the property, it is considered a resource." 20 C.F.R. § 416.1201.

This definition reflects two critical components: (1) ownership and (2) the power to liquidate. This case focuses upon the second aspect of the definition.

Transfer of Assets

Under K.A.R. 30-6-56, a " transfer of assets" for less than adequate consideration which occurs within a 3-year " look-back" period will incur Medicaid eligibility penalties if the inclusion of the assets' value causes the applicant' s resources to exceed the $2,000 limit. In this case, Brewer transferred the stock into joint tenancy ownership with her nieces 7 years before her

application for Medicaid, well outside the 3-year time limit. Brewer argues that as a result the stock should not be considered as an available resource. ManorCare' s *amicus* brief makes a similar argument.

To support her argument, Brewer cites § 3258.8 of the Department of Health and Human Services' (DHHS) Centers for Medicare and Medicaid Services' (CMS) State Medicaid Manual. The manual " makes available to all State Medicaid agencies. . . informational and procedural material needed by the States to administer the Medicaid program." CMS State Medicaid Manual, Part 2, Foreword (A). Directives in the manual are " official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies." Part 2, Foreword (B.1). Section 3258.8 provides:

" [If placing another person' s name on the account or asset actually limits the individual' s right to sell or otherwise dispose of the asset *(e.g.,* the addition of another person' s name requires that the person agree to the sale or disposal of the asset where no such agreement was necessary before), such placement constitutes a transfer of assets."

Brewer argues that if she " transferred" the stock in 1994, it must have been unavailable to her in 2001 when she applied for Medicaid. This argument ignores the fact that K.A.R. 30-6-56 defines " transfer of assets" as " any act. . . which *partially* or totally passes the use, control, or ownership of assets of an applicant or recipient to another person." (Emphasis added.) Under this definition, an applicant may transfer an asset even though it only partially passes out of her control. Thus, there is no reason to automatically deem a transferred asset unavailable. The concepts of transfer and availability of assets are not mutually exclusive. If there remains (1) an ownership interest and (2) the authority or power to liquidate the property or the applicant' s share of the

property, the applicant's share of the property is a resource of the applicant regardless of when the partial transfer occurred.

This conclusion is also supported by provisions in the Kansas Economic and Employment Support Manual (KEESM):

"A transfer of assets is an act, contract, or lease which partially or totally passes the use, control and/or ownership of assets to another person or corporation. Thus, for example, adding additional owners to a deed or title or going from sole ownership to joint tenancy shall be regarded as a transfer. Such partial transfers of real property (such as a home or land) could affect eligibility as the value of the property available to the individual has been decreased through ownership. The value of jointly owned real property is prorated and thus the more owners added to the property, the less the value considered for eligibility purposes for any one of them. This would not be true for partial transfers of personal property since the full value of jointly owned personal property is still considered available to each owner." KEESM 5720.

No showing or argument has been made that the provisions in KEESM are rules or regulations under K.S.A. 77-4 *15 et seq.* KEESM does, however, provide SRS' s interpretation of the applicable statutes and regulations. In interpreting administrative regulations, appellate courts generally defer to an agency' s interpretations of its own regulations. The agency' s interpretation will not be disturbed unless it is clearly erroneous or inconsistent with the regulation. *Schmidt v. Kansas Bd. of Technical Professions,* 271 Kan. 206, 214, 21 P.3d 542 (2001). In this situation, the interpretation is consistent with the regulation.

The partial transfer, even though occurring outside the 3-year look-back period, does not mean that the stock or a portion thereof cannot be considered a "resource" since Brewer maintains an ownership interest.

Presumption of Equal Ownership

Next, Brewer argues that even if she retained an interest in the stock, her interest was limited to one-third of its value, or approximately $11,000. ManorCare agrees. SRS contends that Brewer's interest in the stock is its full value of approximately $33,000.

The hearing officer, and later the State Appeals Committee, found that SRS was correct in attributing the full value of the stock to Brewer because her nieces had not contributed to the equity. The administrative decisions were based upon KEESM *5200,* which provides: "In situations of joint ownership of resources . . . the full equity value of jointly owned personal property shall (unless otherwise established) be considered in the determination of eligibility." KEESM 5200, section 6. Since the stock had been owned solely by Brewer before she added her nieces as owners, the hearing officer found that Brewer's equity value equaled the full value of the stock holdings, and the Appeals Committee agreed.

However, the district court found that, because joint tenants are presumed to hold property in equal ownership, the value of the stock attributable to Brewer was approximately $1 1,000. As stated in *Walnut Valley State Bank v. Stovall,* 223 Kan. 459, Syl. ¶ 2, 574 P.2d 1382 (1978), "[t]here is a rebuttable presumption of equal ownership between tenants of joint tenancy property."

Although the hearing officer did not discuss the presumption of equal ownership, SRS argues the presumption of equal ownership is rebutted by any contrary evidence, including evidence that the joint tenants made unequal contributions. In support of this argument, SRS cites *Walnut Valley*. In that case, a judgment creditor of a wife attempted to garnish a joint tenancy bank account established by the wife with her spouse. The court held that the creditor could garnish the account, and such garnishment would sever the joint tenancy, leaving husband and wife as tenants in common. 223 Kan. at 464. The *Walnut Valley* court also concluded that the burden of rebutting the presumption falls on the person attacking the presumption of equal ownership. 223 Kan. at 463. Thus, the wife' s creditor could garnish only one-half of the account unless it could prove that the wife had a greater interest. Or, if the wife could prove that she had less than a one-half interest, the creditor would be limited to that amount. 223 Kan. at 463. " In the absence of proof establishing their contributions toward the deposits the presumption prevails that plaintiffs were equal contributors thereto and, therefore, equal owners." 223 Kan. at 462-63 (quoting *Murphy v. Michigan Trust Co.,* 221 Mich. 243, 190 N.W. 698 [1922]).

Thus, *Walnut Valley* does support SRS' s argument that the presumption of equal ownership can be rebutted with evidence regarding the owner' s relative contribution to the asset and donative intent. In this case, there is evidence which rebuts the presumption. Brewer was originally the sole owner of the stock and later placed her nieces' names on the account. Hence, Brewer' s equity contribution is clear.

However, the analysis should not focus solely upon equity contribution. As *Walnut Valley* further explained, the presumption of equal ownership " is created on the theory of donative intent." 223 Kan. at 462. The court cited a New Jersey case, *Norcross v.*

1016 Fifth Avenue Co., Inc., 123 N.J. Eq. 94, 196 A. 446 (1938), for its explanation of the theory of donative intent. *Norcross* explained that the opening of a joint tenancy account, with all parties agreeing that the monies deposited are to belong to the parties as joint tenants, constitutes prima facie evidence of donative intent. Under such circumstances, the parties have made a valid gift. 123 N.J. at 98.

In this case the evidence regarding Brewer's donative intent was conflicting. As suggested by SRS, there was evidence that Brewer placed her nieces' names on the stock account to avoid probate, intended for the funds to be utilized exclusively for her own support during her lifetime, and did not intend for her nieces to access the funds until her death. Also, SRS argues that since the nieces could not sell the stock without Brewer's consent, it can be inferred that Brewer did not intend a complete gift by adding their names to the stock.

On the other hand, there was some evidence that Brewer had placed her nieces' names on the stock as compensation for the support the nieces had provided over the years. Additionally, Brewer's inability to sell the stock without the consent of her nieces can also be argued to support an inference that she gave away her rights of sole ownership.

With this factual background, we must return to the applicable standard of review which is to determine whether the agency erroneously interpreted or applied the law or whether the agency's action is based on a determination of fact that is not supported by substantial evidence when viewed in light of the record as a whole. K.S.A. 77-621(c).

The district court, in reviewing the agency's action, did not state the applicable standard of review and apparently substituted its own judgment by finding that the presumption of equal ownership had not been rebutted. The weighing of the evidence against the

presumption of equal ownership and a determination of Brewer' s donative intent are issues of fact, and the district court could not simply substitute its judgment for that of the agency. *Hickman Trust v. City of Clay Center,* 266 Kan. 1022, 1036, 974 P.2d 584 (1999).

The agency concluded that the full value of the stock was attributable to Brewer because her nieces had not contributed to the equity. Thus, SRS rebutted the presumption of equal ownership by presenting evidence of unequal equity contribution. Further, SRS introduced evidence regarding Brewer' s intent when she added her nieces as joint tenants, presenting testimony that Brewer placed the stock in joint tenancy in order to avoid probate and did not intend for her nieces to use the property until Brewer' s death. Thus, the agency' s conclusion was supported by substantial evidence when viewed in light of the record as a whole.

Partition

Brewer argues that the stock should not be considered an available resource because of impediments to her ability t o l iquidate t he p roperty. T he hearing officer and State Appeals Committee recognized that there was a legal impediment preventing disposal of the stock in that Brewers' nieces refused to consent to a sale. However, Wilson, as Brewer' s agent pursuant to a power of attorney, has a fiduciary duty to manage her aunt' s affairs, including the pursuit of a legal action to force the sale of the stock. Because Brewer, through Wilson, had not taken reasonable steps to overcome the legal impediment, the stock was considered an available resource.

The district court, however, was persuaded that a partition action was unlikely to succeed and that the cost of such an action would likely exceed Brewer' s share of the stock, $1 1,000. Thus, the district court reversed the decision of the State Appeals Committee.

K.A.R. 30-6-106(c)(1) provides that an asset otherwise available to an applicant will not be considered an available resource if a legal impediment exists which prevents an applicant from disposing of the asset. However, the applicant must take reasonable steps to overcome the legal impediment unless the cost of pursuing legal action would exceed the value of the resource or such an action would be unlikely to succeed. KEESM 5200, section 3 provides:

" a. A resource shall be considered unavailable when there is a legal impediment that precludes the disposal of the resource. *Examples of legal impediments would include* property which is inaccessible pending the disposition of divorce proceedings, jointly *owned property which cannot be disposed of due to the refusal of the other owners to agree to a sale,* or inability to obtain clear title. The client shall pursue reasonable steps to overcome the legal impediment unless it is determined that the cost of pursuing legal action would be more than the applicant or recipient would gain or the likelihood of succeeding in the legal action would be unfavorable to the applicant or recipient." (Emphasis added.)

SRS does not dispute that there was a legal impediment to liquidation. However, at each hearing level it was determined that Wilson, as Brewer' s agent through a power of attorney, could file a partition action.

K.S.A. 60-1003(a) allows an action for the partition of real or personal property. See *Mulsow v. Gerber Energy Corp.,* 237 Kan. *58,* 60, 697 P.2d 1269 (1985) (K.S.A. 60-1003 sets out the procedure to be followed in a partition action but does not create a substantive right to partition). Generally, the right to partition is recognized whenever property is jointly held. *Miller v. Miller,* 222 Kan. 317, 320, 564 P.2d 524 (1977).

However, Brewer argues that she has no right to force a partition sale of the stock because she voluntarily agreed to hold the stock in such a manner that no joint tenant could transfer the stock without the consent of the other joint tenants. In support, she cites *Hotchkin v. Hotchkin,* 105 N.J. Super. 475, 253 A.2d 184 (1969), for the premise that ownership of stock in a manner that prevents its sale without unanimous consent of the joint tenants prevents one joint tenant from seeking partition of the stock.

In *Hotchkin,* ex-wife brought a partition suit against ex-husband regarding various jointly held securities. During divorce proceedings, the parties had previously entered into a written separation agreement containing a provision stating that all jointly owned stocks and securities could be sold or traded only upon mutual consent of the parties. The court ruled that, under this provision, the parties had impliedly agreed not to partition the securities; thus, it denied the ex-wife' s claim for partition. 105 N.J. Super. at 482.

Kansas also recognizes that a cotenant is not entitled to partition where he or she has entered into an agreement not to partition. *Gore v. Beren,* 254 Kan. 418, 423, 867 P.2d 330 (1994). An agreement not to partition may be implied or expressed. " An agreement not to partition is implied where the purpose of the transaction would be defeated by partition. For instance, an agreement giving cotenants rights of first refusal implies an agreement not to bring a partition action in lieu of a sale to the cotenants." 254 Kan. 418, Syl. ¶ 3.

In *Gore,* the parties had entered into a real estate contract giving each cotenant a right of first refusal before another cotenant could sell his or her interest. The court found this provision did not expressly waive the right to partition but did impliedly waive the right to partition until there was compliance with the

provision giving the right of first refusal. 254 Kan. at 425, 428. The court explained:

" Because implied waiver of the right to partition is based on interpretation of a contract or agreement between cotenants, whether an agreement constitutes an implied waiver of the right to partition and the extent of that implied waiver or the condition for restoring the right to partition should be determined on a case-by-case basis. See, *e.g.,* 59A Am. Jur. 2d, Partition § 61; 68 C.J.S., Partition § 44, p. 67. Thus, not every instance where cotenants agree to a preemptive right or right of first refusal provision is automatically deemed to imply waiver of the right to partition. Because the right to partition enjoys a favored status in the law and is 'based on the equitable doctrine that it is better to have the control of property in one person than in several who may entertain divergent views with respect to its proper control and management,' *[Miller v. Miller,* 222 Kan. 317, Syl. ¶ 4, 564 P.2d 524 (1977)], any agreement which purports to waive the right to partition should be strictly construed." 254 Kan. at 426.

In this case, a representative of Merrill Lynch testified that the stock in question cannot be sold or otherwise disposed of without the consent of each joint tenant. Although the record on appeal does not include a copy of an executed agreement containing such a provision, the fact that such a restriction exists is not in dispute. However, what is not clear is whether the restriction was a matter of contract between the tenants or was unilaterally imposed by Merrill Lynch. If it was simply a Merrill Lynch policy that all three joint tenants consent to a sale or transfer of the stock, rather than an agreement between the joint tenants themselves, this would detract from Brewer's argument that her agreement not to sell the stock without the consent of her nieces could be raised as a defense in a partition action. The cases Brewer cited in her brief all involved some agreement, whether in a

divorce settlement agreement or a real estate contract, not to partition. The fact that the stock could not be sold in this case without the consent of all three joint tenants appears less due to any agreement they made and more due to the internal policies of Merrill Lynch.

However, at the very least, Brewer has demonstrated that her nieces would have a possible defense to any partition action. Whether the manner in which the stock is held would amount to an implied waiver of the right to partition would need to be determined and would likely be hotly contested. Thus, a partition action would not necessarily be the simple procedure suggested by SRS.

With this in mind, Brewer contends that the agency ignored the exceptions for cost and low probability of success in finding that she was ineligible for Medicaid because she had not taken legal action to force a sale of the stock. As a result, Brewer argues the agency erroneously interpreted or applied K.A.R. 30-6-106(c)(1) in denying her application for benefits. SRS counters that Brewer did not establish her donative intent or present evidence or even argument at the hearing on which the determination of cost of litigation could be based.

Generally, the applicant has the burden of proof to establish eligibility for Medicaid. *Fischer v. Kansas Dept. of SRS,* 271 Kan. 167, 176-77, 21 P.3d 509 (2001). K.A.R. 30-6-39 states that applicants shall " [s]upply, insofar as the applicant or recipient is able, information essential to the establishment of eligibility." Furthermore, the administrative hearing officer' s " [f]indings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." K.S.A. 77-526(d). Despite this, nothing was presented at the administrative hearing regarding why a partition was not filed, anticipated

difficulties with litigation, or potential costs of the action.

Under the KJRA, the court conducting judicial review of the agency action is limited in its review of facts by K.S.A. 77-618, which provides that " [j]udicial review of disputed issues of fact shall be confined to the agency record for judicial review." Some exceptions are provided for, but none apply in this case. See K.S.A. 77-6 19. I n this case, the district court m ade findings regarding the attorney fees, based upon its own knowledge and expertise, and evaluated the costs and anticipated fees of such an action. In essence, the district court acted as an expert on attorney fees, which it is allowed to do when acting as a factfinder. However, it is error to do so when conducting a judicial review of agency action.

In reviewing the facts which were presented to the agency, the district court is to determine if there was substantial evidence to support the agency' s findings. Conflicting evidence or other findings are to be disregarded. See *Connelly v. Kansas Highway Patrol,* 271 Kan. 944, 964-65, 26 P.3d 1246 (2001), *cert. denied* 534 U.S. 1081 (2002). In this case, the district court reweighed the evidence and determined that the costs should be taken from one-third of the stock value, rather than the entire value which the agency had determined was available to Brewer.

Brewer failed to meet her burden to establish that the cost of the partition action would exhaust her equitable interest in the stock value.

Federal Law

Both Brewer and ManorCare argue that the provisions of K.A.R. 30-6-106(c)(1) are contrary to controlling federal authority which prohibits states from considering resources that are not available to applicants under standards set by the Secretary of

Health and Human Services or that would not be considered in connection with an application for social security income. Brewer also cites the Social Security Administration' s Program Operations Manual System (POMS) in support of her argument.

Under POMS S101120.010, " [w]hen there is a legal bar to sale of property *(e.g.,* if a co-owner legally blocks sale of jointly-owned property), we do not require an individual to undertake litigation in order to accomplish sale or access." POMS also gives two examples of situations where property would not be considered a r esource. In one example, an applicant and his brother own stock as joint tenants subject to a binding agreement that one will not sell without consent of the other. Under these circumstances, unless the brother agrees to sell, the applicant' s share is not considered a resource. In another example, an applicant and her estranged spouse own a cottage which the applicant could not sell unless she took legal action to dissolve her marriage. Because the rules do not require litigation to obtain access to resources, the property is not considered a resource.

First, we note that POMS guidelines are not regulations:
" While Program Operations Manual System (POMS) guidelines do not have the force and effect of law, they do have some value, effect, and persuasive force.

. . . .

" POMS is essentially a set of detailed guidelines relating to interpretations and procedures to be followed by the staff of the SSA. It is at least a clear indication of the agency' s intended application of the governing law and its views on what that law means." 70A Am. Jur. 2d, Social Security and Medicare § 17.

The " standards" referred to by 42 U.S.C.A. 1396a(a)(17)(B) are only the regulations adopted by

the Secretary and not the rules set out in POMS. Kansas regulations cannot conflict with the federal regulations. However, SSA policy interpretations do not have the force and effect of a statute or regulation by the federal agency. See *Anderson v. Iowa Depart. of Human Serv.*, 368 N.W.2d 104, 108 (Iowa 1985).

In this case, K.A.R. 30-6-106(c)(1) is a reasonable standard for determining Medicaid eligibility and does not conflict with a federal statute or regulation.

Reversed.

DAVIS, J., dissenting: I respectfully disagree with the majority' s conclusions that the full value of the stock is available and attributable to Brewer, that the district court was unable to estimate attorney fees for a partition action, that Brewer must seek to partition the property under state and federal law, and that Kansas regulations control over federal statutes or regulations concerning eligibility.

In my opinion, the transfer of the stock vested an undivided one-third interest in Brewer and an undivided one-third interest in each of her nieces. Moreover, if, as the majority opines, Brewer must partition, which I do not think the law requires, the value of her share is one-third.

I agree with the district court' s determination based on available evidence that the cost of a partition in this case would exceed Brewer' s one-third interest. I would therefore affirm the decision of the district court on its determination that the fees would consume Brewer' s interest in the stock and for other reasons stated below. See *Drake v. Kansas Dept. of Revenue,* 272 Kan. 231, 239, 32 P.3d 705 (2001) (reason given by the trial court for its ruling is immaterial if the result is correct for any reason).

The majority concludes that a partial transfer of an asset occurring outside the 3-year look-back period does not make the stock an unavailable resource to Brewer. It bases its decision on K.A.R. 30-6-56, which defines " transfer of assets" as " any act. . . *which partially* or totally passes the use, control, or ownership of assets of an applicant or recipient to another person," and upon the Kansas Economic and Employment Support Manual (KEESM) 5720 which suggests that when personal property is partially transferred " the full value of jointly owned personal property is still considered available to each owner." (Emphasis added.)

I agree that the concepts of transfer and availability of assets are not mutually exclusive. However, I disagree that the full value of the transferred stock was available to Brewer under either federal or state law.

The directives of the Centers for Medicare and Medicaid Services' (CMS) State Medicaid Manual are the " official interpretations of the law and regulations, and, as such are binding on Medicaid State agencies.' CMS State Medicaid Manual, Foreward. Section 3258.7 provides:

" [I]f placing another person' s name on the account or asset actually limits the individual' s right to sell or otherwise dispose of the asset *(e.g.,* the addition of another person' s name requires that the person agree to the sale or disposal of the asset where no such agreement was necessary before), such placement constitutes a transfer of assets."

A close examination of this definition and the nature of the transfer in this case demonstrates that Brewer transferred her stock to herself and her nieces in joint tenancy, acquiring an undivided one-third of the stock only. Before the transfer, Brewer had the right to sell or otherwise dispose of the stock; after the transfer Brewer could not sell or otherwise dispose of the stock unless her nieces joined in the sale. Thus, placing the

nieces' names on the stock constitutes a " transfer of assets."

It is important to consider the nature of the transfer in question. This is not a joint bank account where placing additional names on the account does not necessarily limit the transferor' s control over all the property. See *Walnut Valley State Bank v. Stovall,* 223 Kan. 459, 574 P.2d 1382 (1978). In order to transfer the stock, Brewer had to contact an attorney or broker, bring her original stock certificate to the broker, and make the request to the company issuing the stock that the new stock be vested in herself and her two nieces. The original certificate of her stock, together with her request, is then sent to the company. The company destroys the original certificate and issues a new certificate of stock with all three names entered on the face of the new certificate. Never again will Brewer alone be able to sell the certificate or realize anything but one-third of the proceeds from the sale or disposition of the stock.

It is also important to note that this transfer took place 7 years ago and not for the purpose of removing assets from her estate so that she would be eligible for Medicaid benefits. There is no evidence of fraud in this case. The 3-year look-back provision of federal law is designed to provide the federal government protection against transfers made within 3 years of an application for benefits. I interpret KEESM 5720 as either relating to transfers within the 3-year period or as dealing with partial transfers under local law where the transferor partially transfers his or her interest in personal property but retains control.

In this case, Brewer transferred an undivided two-thirds of the stock she received from her husband' s estate. Finding that the whole amount of the stock was available to Brewer ignores the fact that Brewer no longer has control over an undivided two-thirds of the stock in that she retains only an undivided one-

third interest in the stock. Her ability to realize her one-third interest is dependent upon her nieces or a partition suit.

In this same vein, the majority opinion attributes the entire value of the stock to Brewer when under federal and state law Brewer is vested with only one-third of the value of the stock. Kansas law is clear, as the majority recognizes that " [t]here is a rebuttable presumption for equal ownership between tenants of joint tenancy property." See *Walnut Valley State Bank,* 223 Kan. 459, Syl. ¶ 2. This same presumption exists upon partition.

Applying a deferential standard of review, the majority found substantial competent evidence supported the Kansas Department of Social and Rehabilitation Services (SRS) conclusion that the full value of the stock was attributable to Brewer because her nieces had not contributed to the equity and Brewer had failed to establish that the stock was a gift to the nieces. However, SRS is the moving party in this case and ought to establish that there was unequal ownership. Thus, SRS must overcome the rebuttable presumption. The evidence relied upon by SRS is that Brewer owned all the stock prior to the transfer and lid not gift the property to her nieces but sought to avoid probate. Nevertheless, the evidence established that the nieces claimed their one-third interest in the stock, based on their services rendered or simply because their aunt gave them a one-third interest in stock.

While Kansas law allows for partition of jointly held property, in such a lawsuit Brewer would be claiming only a one-third interest. Her request would be consistent with the existing rebuttable presumption, and the court would grant her such an interest. See K.S.A. 60-1003; *Miller v. Miller,* 222 Kan. 317, 320, 564 P.2d 524 (1977). If SRS were joined in the partition suit claiming that Brewer had an interest in

all of the stock, it is more than likely that a court would acknowledge the nieces' interest some 7 years after the transfer, especially since there is no allegation of incompetency. However, as the trial judge noted, based upon a suit involving SRS, the nieces, and Brewer, a partition suit would be prolonged and complicated. Thus, Brewer would expend more in fees than the one-third value of the stock.

I did agree with the majority' s conclusion that the district court substituted its judgment for that of the administrative tribunal in this case. Rather, after considering the evidence in the administrative hearing and giving consideration to Kansas and federal law, the nature of the transfer of stock vesting only a one third interest in Brewer, the time-lapse between the transfer and eligibility determination, the determined attitude of the nieces concerning the property, and the lack of any substantial rebuttable evidence by SRS, the district court determined that Brewer' s interest in the stock was an undivided one-third and partition would consume such interest.

The district court is an expert in the area of attorney fees and can draw on and apply its own knowledge and expertise in evaluating the amount of fees consistent with the evidence. See *Davis v. Miller,* 269 Kan. 732, Syl. ¶ 6, 7 P.3d 1223 (2000). Both determinations by the district court are supported by the evidence and certainly reflect Brewer' s transfer of interest and the cost of fees in partition. The court made its determination of fees based upon the only available evidence. In my opinion, its decision should be affirmed.

Federal law and policy support the alternative conclusion that the stock in question should not be considered an asset for purposes of determining Brewer' s eligibility for assistance. We deal with federal funds administered by the State of Kansas.

Federal law and policy suggest a result different than the majority opinion, yet, the majority bases its decision almost exclusively upon K.A.R. 30-6-106(c)(1), which provides:

" (c)(l) Resources shall be considered available both when actually available and when the applicant or recipient has the legal ability to make them available. A resource shall be considered unavailable when there is a legal impediment that precludes the disposal of the resource. The applicant or recipient shall pursue reasonable steps to overcome the legal impediment unless it is determined that the cost of pursuing legal action would exceed the resource value of the property, or that it is unlikely the applicant or recipient would succeed in the legal action."

If federal law and policy were given some sway in interpreting state law, the result in this opinion would be different. The following federal law and policy concerning eligibility for federal Medicaid funds was virtually ignored by SRS in the hearing below and should be applied to affirm the district court.

The federal Medicaid Act was enacted as a *cooperative* federal/state program to provide health care to certain individuals.

" While a state is not required to participate in Medicaid, once it elects to do so, it must comply with the Medicaid statute and the regulations promulgated by the Secretary of the United States Department of Health and Human Services (Secretary of HHS). In determining eligibility, *states may take into account only those resources deemed available by the Secretary of HHS."* (Emphasis added.) *Martin v. Kansas Dept of SRS,* 26 Kan. App. 2d 511, 512, 988 P.2d 1217 (1999) (citing *Himes v. Shalala,* 999 F.2d 684, 686 [2d Cir. 1993], and *Williams v. Kansas Dept. of SRS,* 258 Kan. 161, 164-65, 899 P.2d 452 [1995]).

" A state, in administering its Medicaid program, must set reasonable standards for assessing an individual' s income and resources in determining eligibility for, and the extent of, medical assistance under the program. Those standards m ust t ake i nto account *only such* income and *resources as are available to the* applicant or *recipient as determined in accordance with standards prescribed by the Secretary of Health and Human Service.* 42 U.S.C. § 1396a(a)(17)(B) (1988)." (Emphasis added.) *Ussery v. Kansas Dept. of SRS,* 258 Kan. 187, Syl. ¶ 1, 899 P.2d 461 *(1995).*

The United States Code relating to grants to states for medical assistance programs further limits consideration to such income and resources as would not be disregarded in determining an applicant' s eligibility for other programs, including Supplemental Security Income (SSI). See 42 U.S.C.A. § 1396a (a)(17)(B) (Supp. 2004); Social Security Administration' s Program Operation Manual System (POMS) SI 01 120.001.

Federal regulations relating to social security administration define resources as " cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and *could convert to cash* to be used for his or her support and maintenance." (Emphasis added.) 20 C.F.R. § 416.1201(a). Subsection (a)(1) provides that ' [i] f the individual has the right, authority or power to liquidate the property or his share of the property, it is considered a resource. If a property right cannot be liquidated, *the property will not be considered a resource."* (Emphasis added.) 20 C.F.R. § 416.1201(a)(1).

POMS are important guidelines actually used though not required to be used in determining eligibility for Medicaid. They are required to be used in determining eligibility for SSI. Note the similarity between the two

applications; one involves Medicaid funds and the other involves supplemental security income. While the majority rejects POMS because they are not regulations, there is no disagreement that the POMS are used often in determining Medicaid eligibility. POMS provide persuasive authority of the agency's intended application of the governing law and its views on what the law means. See 70A Am. Jur. 2d, Social Security and Medicare § 17.

POMS SI 01120.010 provides that "[w]hen there is a legal bar to sale of property *(e.g.*, if a co-owner legally blocks sale of jointly-owned property), *we do not require an individual to undertake litigation in order to accomplish sale or access.*" (Emphasis added.) In my opinion, the POMS guidelines, coupled with the other federal statutes and regulations above, clearly demonstrate that the Secretary of Health and Human Services would not consider Brewer's interest in the stock a bar to her eligibility for Medicaid funds. A partition suit would not be required under federal law and policy. At the very least, given federal law and policy on this subject, more emphasis should be given to federal law and policy instead of focusing almost exclusively on a Kansas regulation, K.A.R. 30-6-106(c)(1), for the conclusion that the whole value of the stock is attributable to Brewer. This conclusion is a bit of a strain in reaching a result that fails to reflect Brewer's ability to convert the stock into cash and is only able to do so by a partition suit.

My concern is, as indicated above, that the majority decision forces Brewer to liquidate through a difficult and tedious lawsuit in partition in order that she may realize less than $2,000 from her actual interest of $1 1,000, a fact the court said would cost more than her interest in the stock. Brewer cannot sell the stock, but she is forced to liquidate and pay fees that in all likelihood would consume the actual interest in the asset.

Based upon the above analysis, I would conclude that under federal law and state law interpreted in light of the federal law and policy, Brewer' s interest should not be counted as a resource in determining her eligibility for Medicaid. Alternatively, if Brewer is forced t o l iquidate h er i nterest i n the stock through partition, the evidence of record establishes that her fees would exceed her interest.

I would affirm the district court.

SUPREME COURT ORDER
DISTRICT CASE NO. 02CV5565 JO

IN THE SUPREME COURT
OF THE STATE OF KANSAS

KEITH MARTIN
PAYNE & JONES
11000 KING STE 200
PO BOX 25625
OVERLAND PARK KS 66225-5625

CASE NO. 03-91044-AS

REGINA a. BREWER, APPELLEE,
v.
JANET SCHALANSKY, ETC., APPELLANT,
AND
REGINA HELLEBUYCK, ET AL., APPELLEE.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION BY REGINA G. BREWER.

CONSIDERED BY THE COURT AND DENIED. RESPONSE NOTED.

DATE: 01/26/2005.

CAROL G. GREEN
CLERK

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

REGINA G. BREWER,	)
Petitioner,	)
vs.	)
	)
JANET S. CHALANSKY, (sic) etc.)	
Respondent,	)CaseNo.02CV05565
and	) Court No. 4
	) Chapter 60
Regina Hellebuyck, et al.	)
Defendants.	)

JOURNAL ENTRY OF JUDGMENT

On the 14th day of February, 2003, the above-captioned matter came for a hearing before the Court on Petitioner' s Petition for Judicial Review.

Petitioner appears by Keith Martin and Christopher J. Sherman. Respondent appears by Reid Stacey. There are no other appearances.

Having heard the arguments of counsel, the Court finds in favor of the Petitioner for the following reasons:

1. Petitioner is not obligated to file a lawsuit to seek partition of the stock because the cost of pursuing such lawsuit would likely exceed the benefit Petitioner would receive if successful in that lawsuit; and

2. Petitioner is not obligated to file a lawsuit to seek to partition of the stock because Petitioner' s likelihood of success in such lawsuit is unfavorable to her. Having decided in Petitioner' s favor on these grounds, the Court chooses not to address Petitioner' s argument that the federal law precludes respondent from considering the stock as resource that is available to Petitioner.

The court makes such further findings as are set forth in the transcript of the hearing on this matter, a partial copy of which is attached hereto.

The decision of the State Appeals Committee is reversed, and the case is remanded to the Department of Social and Rehabilitation Services for further action not inconsistent with this Judgement.

IT IS SO ORDERED.

/s/ Gerald T. Elliot
Judge of the District Court

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS
DEPARTMENT OF ADMINISTRATION

REGINA BREWER,	)
	)
Appellant,	)
	)Appeal No. 02MS0224
v.	)
Kansas Department of Social and Rehabilitation Services,	)
	)
Respondent.	)

FINAL ORDER

Statement of Case

On the 31st day of May 2002, Stephen Good, Presiding Officer, Office of Administrative Hearings, issued an Initial Order in the fair hearing of Regina Brewer. The Presiding Officer affirmed the agency's action denying Ms. Brewer's application for medical assistance due to excess resources. The appellant's request for oral argument is denied.

Findings of Fact

1. In November 2001, Regina Brewer (dob 7/22/08) entered Manor Care Health Center following a brief stay in the hospital.

2. On December 28 2001, Ms. Brewer's niece and power of attorney, Joan Sieker Wilson, applied for medical assistance from SRS to help pay for her nursing home bill.

3. Ms. Brewer owns telecommunication stocks. As of December 28, 2001, the approximate value of these stocks was $33,000. In 1994, Ms. Brewer

transferred these stocks to herself, to Ms. Sieker Wilson and to her other niece, Regina Hellebuyck, as joint tenants with rights of survivorship.

4. By a notice dated January 14, 2002, SRS advised Ms. Brewer that her application was denied because she owns resources greater than $2,000.

5. In taking its action SRS relies upon provisions in the Kansas Economic Employment Support Manual (KEESM). This manual is based on state and federal regulations. In order to be eligible for medical assistance, one cannot own resources in excess of $2,000. KEESM §5 130. When property is owned jointly, the party who contributed the equity is considered the full owner pursuant to KEESM § 5 200(6).

6. Ms. Brewer owned all the stocks in 1994 before she added her nieces' names. The nieces did not contribute to the equity. SRS is correct to attribute full ownership of the stock to Ms. Brewer. Ms. Brewer contends the stock is not available because Regina Hellebuyck does not consent to the sale of the stock. KEESM § 5200(3) addresses availability of resources relied upon by the agency.

7. As Ms. Brewer' s POA, Ms. Sieker Wilson has a fiduciary duty to manage her aunt' s affairs. If Ms. Brewer needs money to pay her nursing home bills, Ms. Sieker Wilson has an obligation to access such funds. She needs to pursue reasonable steps to make the stocks available, which would include pursuing legal action if need to be to force a sale.

8. Although Ms. Hellebuyck' s refusal to sign documents needed to sell the stock is a legal

impediment, it is one which Ms. Brewer and her power of attorney must take reasonable steps to overcome. To date, steps have not been taken to make the stock available for Ms. Brewer' s use. Hence, the s tock i s c onsidered an available resource.

9. The presiding officer affirmed the finding of the Agency.

10. On June 5, 2002, the Appellant requested review of this decision by the State Appeals Committee.

Arguments

The Appellant argues that because each of the owners of the stock must sign the certificates or stock power, it differs from a joint bank account where any joint tenant can withdraw the funds, and therefore, because Regina Hellebuyck refuses to consent to the sale, the stocks are unavailable to Ms. Brewer.

The Respondent argues that because Ms. Brewer has taken no action to try to made her stocks immediately available, the stocks remain available to her.

Conclusions of Law

The State Appeals Committee reviewed the record, the arguments before it, and the Presiding Officer' s Initial Order. The Committee hereby adopts the Presiding Officer' s Conclusions of Law and affirms the Initial Order.

STATE APPEALS COMMITTEE

/s/ George Vega

/s/ James Wann

/s/ Diane Duffy

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 19th day of August, 2002, a true and correct copy of the foregoing *Final Order* was deposited in the United States Mail, first class postage pre-paid, addressed to:

Regina Brewer
Manor Health Care
5211W. 103~d,Room 105
Overland Park, KS 66207

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Overland Park SRS Office
8915 LenexaDr.
Overland Park, KS 66214

/s/ Margaret A. Graham, Coordinator
State Appeals Committee

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS
DEPARTMENT OF ADMINISTRATION

Regina Brewer,
Appellant

Appeal No. 02M0224 MA

v.

Kansas Department of Social and Rehabilitation Services,
Respondent

INITIAL ORDER

Statement of Case

Regina Brewer appeals from the agency' s denial of her application for medical assistance due to excess resources.

This matter comes before the Office of Administrative Hearings for an administrative hearing pursuant to K.S.A. 75-3306, K.S.A. 75-37,121 and K.S.A. 77-501 *et. seq.*

Testifying for the respondent at the May 29, 2002 hearing was Kathy Edminister. Testifying for the appellant were Joan Sieker Wilson, Regina Hellebuyck and Daniel Benninghoff.

Findings of Fact

1. In November 2001, Regina Brewer (dob 7/22/08) entered Manor Care Health Center following a brief stay in the hospital.

2. On December 28 2001, Ms. Brewer' s niece and power of attorney, Joan Sieker Wilson, applied for

medical assistance from SRS to help pay for her nursing home bill.

3. Ms. Brewer owns telecommunication stocks. As of December 28, 2001, the approximate value of these stocks was $33,000. In 1994, Ms. Brewer transferred these stocks to herself, to Ms. Sieker Wilson and to her other niece, Regina Hellebuyck, as joint tenants with rights of survivorship.

4. By a notice dated January 14, 2002, SRS advised Ms. Brewer that her application was denied because she owns resources greater than $2,000.

Conclusions of Law

1. In taking its action SRS relies upon provisions in the Kansas Economic Employment Support Manual (KEESM). This manual is based on state and federal regulations.

2. In order to be eligible for medical assistance, one cannot own resources in excess of $2,000. KEESM §5130.

3. When property ~s owned jointly, the party who contributed the equity is considered the full owner. KEESM § 5200(6) reads in part:

> Ownership of property is to be determined by legal title. ... In situations of joint ownership of resources, ... the full equity value of jointly owned personal property shall (unless otherwise established) be considered in the determination of eligibility.
>
> Resources held jointly with a nonhousehold member may also be excluded from consideration if:

(a) The client can demonstrate that the client has no ownership interest in the resource;

(b) Has not contributed to the resource; and

(c) That any access to the resource by the client is limited to acting as an agent for the other person.

4. Ms. Brewer owned all the stocks in 1994 before she added her nieces' names. The nieces did not contribute to the equity. SRS is correct to attribute full ownership of the stock to Ms. Brewer.

5. Ms. Brewer contends the stock is not available because Regina Hellebuyck does not consent to the sale of the stock. KEESM §5200(3) addresses availability of resources and provides:

> Resources must be available. Resources are considered available when an applicant/recipient has a legal interest therein and the legal ability to make them available.
>
> (a) A resource shall be considered unavailable when there is a legal impediment that precludes the disposal of the resource. Examples of legal impediments would include property which is inaccessible pending the disposition of divorce proceedings, jointly owned property which cannot be disposed of due to the refusal of the other owners to agree to a sale, or inability to obtain clear title. The client shall pursue reasonable steps to overcome the legal impediment unless it is determined that the cost of pursuing legal action would be more than the applicant or recipient would gain or the likelihood of succeeding in

the legal action would be unfavorable to the applicant or recipient. There is no time limitation in regards to efforts made to overcome a legal impediment and the property shall be regarded as unavailable throughout this period. If the impediment cannot be resolved, the property shall be exempted without requiring further action. If the impediment is overcome, the property would be considered in determining eligibility unless the client begins to make a bona fide effort to dispose of the property as noted in (b) below.

6. As Ms. Brewer' s POA, Ms. Sieker Wilson has a fiduciary duty to manage her aunt' s affairs. If Ms. Brewer needs money to pay her nursing home bills, Ms. Sieker Wilson has an obligation to access such funds. She needs to pursue reasonable steps to make the stocks available, which would include pursuing legal action if need to be to force a sale.

7. Although Ms. Hellebuyck' s refusal to sign documents needed to sell the stock is a legal impediment, it is one which Ms. Brewer and her power of attorney must take reasonable steps to overcome. To date, steps have not been taken to make the stock available for Ms. Brewer' s use. Hence, the stock is considered an available resource.

Conclusion

Regina Brewer' s resources exceed the $2,000 limit. This makes her ineligible for medical assistance. Ms. Brewer (or her power of attorney) has not taken steps to make her resources available; and therefore, pursuant to the rule cited above, they are considered available. The agency' s denial of Ms. Brewer' s application is affirmed.

OFFICE OF ADMINISTRATIVE HEARINGS

/s/ Stephen E. Good
Presiding Officer
Office of Administrative Hearings

CERTIFICATE OF SERVICE

On May 31st, 2002, I mailed a copy of this document to:

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/s/ Stephen E. Good, Presiding Officer
Office of Administrative Hearing